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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

REARDEN LLC, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	**NO. CV 17-04006-JST**
	)	
THE WALT DISNEY COMPANY, ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

Oakland, California
Thursday, November 30, 2023

TRANSCRIPT OF PROCEEDINGS

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Thursday - November 30, 2023 **9:00 a.m.**

P R O C E E D I N G S

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THE CLERK: Your Honor, now calling CV 17-4006-JST, Rearden, LLC, et al. vs. The Walt Disney Company, et al.

If counsel could please state their appearances for the record, starting with counsel for plaintiffs.

MR. CARLSON: Good morning, Your Honor. It's Mark Carlson for Rearden. With me today are my colleagues Jerrod Patterson and Garth Wojitanowicz, who will also be participating.

THE COURT: Good morning.

MR. KLAUS: Good morning, Your Honor. Kelly Klaus from Munger Tolles & Olson for the defendant. I'm joined by my colleagues John Spiegel, Blanca Young, and Stephanie Herrera, who also may be participating.

THE COURT: Good morning. I don't know if anyone announced Mr. Schwab's appearance, but I see him on my screen.

MR. KLAUS: I apologize, Your Honor. That was my fault. John Schwab is also here.

THE COURT: Very good.

MR. CARLSON: Also, Your Honor, I think Mr. Perlman will join us if he's not with us already.

THE COURT: All right. Let me look in the attendees column.

THE CLERK: I just promoted him, Your Honor. Or he just declined to be promoted, actually. So I think he might just watch from the attendees.

THE COURT: All right. Very good.

Well, the purpose of this morning's conference is to learn from you whether you believe, having seen the questionnaires, that there are jurors that we should excuse now. Usually that's for hardship reasons, but you may have other reasons. It's not a time to make arguments to me about why you feel jurors should be excused if your opponent does not agree. We'll do that when we select our jury.

And then the other purpose is for you to ask whatever last-minute questions you might have about the trial that we're scheduled to start next week.

I didn't print them out, but I have on my computer screen open tabs for my own notes and the set of questionnaires, so I can jump back and forth as I need to.

Mr. Carlson, have the parties reached any agreements about jurors that should be excused today?

MR. CARLSON: They have, Your Honor. We believe the parties have agreed that jurors 1, 3, 5, and 7 should be excused -- excuse me. 1, 3, and 57. 1, 3, and 57 should be excused for hardship.

THE COURT: Give me just a moment, please.

Yeah. Juror No. 1 will be excused for cause. He states

that he does not speak English sufficiently to serve as a juror in the case.

Juror No. 3 will be excused on hardship grounds. That juror also reports that her English is very limited. But in addition to that, she has medical issues that makes service for her impractical.

Juror No. 57 appears to be working a full-time job and also going to school and reports that it would be a hardship for her, and so she also will be excused on hardship grounds.

If you will give me a moment, I just want to go through my notes and asking -- either asking you about jurors or just signaling to you what I think might happen. I may err on the side of saying nothing, though.

Juror No. 35 is a custodian at San Francisco International Airport. That person's name is Weiyan Wu, W-E-I-Y-A-N, W-U. And they report that they cannot speak or understand English. So I expect that to play itself out next week.

This is the rare case where I might suggest to you that I would like to excuse a juror on my own volition. Juror No. 43, Gretchen Sue Patterson, is 73 years old. She lives in Santa Rosa. She has some concerns about Oakland, which I don't think are a reason to excuse her, having to do with crime and that sort of thing, but also reports that the drive for her would be very, very difficult. And I will tell you that if she had actually asked to be excused in her response to the jury

office, which she did not do, but if she had done that, based on her age, they would have automatically excused her. And so I think it's just -- if she knew -- believe me, if she knew what her rights were, she would have already exercised them. So unless the parties object, I would like to excuse Ms. Patterson this morning.

MR. KLAUS: No objection, Your Honor.

MR. CARLSON: No objection, Your Honor.

THE COURT: Okay. Very good. So we'll excuse her.

Well, I think that's all I have on my own motion. I think there are a couple people here who are going to present fairly compelling hardship requests, but you never know. Sometimes people hear the Court's remarks, and they learn more about the case. And they decide it's interesting, and they decide not to make a hardship request.

You have one juror who has very, very strong feelings about the United States court system, capitalism, media, your clients, and I think probably many other topics, but we'll learn more about that next week.

Does anyone have any questions or concerns that we should talk about while we're all together?

Mr. Carlson?

MR. CARLSON: About the jurors, Your Honor?

THE COURT: About anything.

MR. CARLSON: Oh, well, we do have a couple, then.

How many jurors will be selected?

THE COURT: Nine.

MR. CARLSON: Okay. And then --

THE COURT: Can I ask you a question? Let me ask the group and tell you what my experience has been. I don't know if I've had more trials than anyone since we resumed after COVID, but I would be surprised if there are a lot of my colleagues who have had more than I have. So I have been in trial a lot. And I have experienced a much greater number of failures to appear, which is fine. We've -- we've ordered up enough jurors in advance. I think we've dealt with that.

But in addition to that, jurors are a little bit less likely to stick it out. And so I -- I've -- I just had a criminal case where I had, I don't remember, six alternates. I mean, it was a seven-week case, but we were down to one alternate by the end. And so I said nine because I just sort of have a rule of thumb. Given the length of this trial, that's what I would normally do. But I'm interested in what the parties think.

Mr. Carlson, do you have a view?

MR. CARLSON: We don't have an objection to nine, Your Honor.

MR. KLAUS: No objection, Your Honor.

THE COURT: Okay. If you all think nine is enough, I think nine's enough. That's what we will do.

Mr. Carlson, what other questions do you have?

MR. CARLSON: Yeah. So these are going to pop around a little bit, Your Honor.

So in the transcripts, right, the video transcripts, there are a number of instances where the opposite party's counter designation is at a different point in the transcript from the designation that it's supposed to correspond to.

THE COURT: Oh, yeah. And I owe you some rulings. I need to start doing that work also. Right?

MR. CARLSON: Right. The question is simply whether we may run the selections, counters and directs, just sequentially in the transcript so that the counter-designation comes up wherever it comes up in the transcript, not necessarily spliced in next to the designation.

THE COURT: I don't know.

What does your opponent think?

MR. CARLSON: Well, it sounds like we need to raise that with -- we haven't brought that up yet.

THE COURT: I mean, this is -- these are --

MS. YOUNG: This is Blanca Young --

THE COURT: Hold on, Ms. Young, just one second.

Every single time from now on that you ask the Court for anything, the first thing I'm going to ask you is, "What does the other side think?" And I mean anything: Take a witness out of order; I need an early bathroom break; can I put my

boxes here. Anything. Because most of the time, the other side is going to agree, and then I don't have to get involved. And it will just make for a smoother trial for everybody. So I don't know.

MR. CARLSON: Okay.

MS. YOUNG: Your Honor, this is Blanca Young. May I be heard on that issue because I do think the parties have discussed this and agreed on it, actually?

THE COURT: Okay.

MS. YOUNG: We have a stipulation regarding deposition designations, and that's part of the pretrial conference order that's before the Court right now. And I believe what we agreed in there was that whatever is designated will just be played sequentially as it appears in the transcript, but I'm happy to confirm that offline with Mr. Carlson.

THE COURT: I think the order to which you referred a moment ago, Ms. Young, is that the order that memorializes certain rulings on motions in limine as to which there was no argument and that sort of thing?

MS. YOUNG: No. It's the joint pretrial conference statement that we submitted most recently to the Court. Let me get the docket number for Your Honor. It is docket No. 593, and there's a section in there for stipulations. I believe it addresses this issue.

MR. KLAUS: It does.

MR. CARLSON: And we could -- we could deal with this offline. What Ms. Young has suggested is what we had in mind as well. So it sounds like the parties are in agreement.

THE COURT: What -- Docket No. 593 says at page -- at ECF page 11, which is page 10 of the document, all designations will be presented in the order in which the testimony was given originally. So --

MR. CARLSON: I'm sorry. I overlooked that, and I apologize.

THE COURT: That's all right. It's great to have an answer so quickly.

MR. CARLSON: Yes.

Your Honor, we have discussed this point, and we're not able to resolve it ourselves.

How does the Court like to see depositions read into the record when unfortunately we have to do that? I've done it a number of ways. Sometimes we put one of our colleagues in the witness box, and we read the transcript back and forth. That's somewhat more engaging than just having one attorney stand and read the whole thing. I just wanted to know if the Court had a preference.

THE COURT: Well, let me find out what the parties -- as you know, there is no rule about this. It's just a matter of judicial administration, so let me find out what the parties' competing proposals are.

MR. KLAUS: Our preference, Your Honor, would be to have the attorney read the transcript. That reduces the possibility of the person in the box adding their own intonation and acting. We understand there is -- there is an instruction that can -- can be given on that, but that would be our preference to have the lawyer just read the transcript.

THE COURT: Yeah. Mr. Carlson, what's your preference?

MR. CARLSON: Our preference would be the former, would be that we put someone in the box and have the interchange just because I think it's more engaging for the jury. And neither party should be play acting.

THE COURT: Well, we're going to do it the way -- we're going to do it the way plaintiffs have requested. I see zero possibility of prejudice. Jurors are so smart, and they're not -- and when someone gets on the stand -- and they have been told by the Court that the person reading it -- you know, there's no way to tell what the intonation was at the deposition and that sort of thing. And if the -- the lawyer or the paralegal or what have you gets on the stand and starts hamming it up, the jurors are going to hold it against them. So I -- I -- I have never had a problem with this.

What's next?

MR. CARLSON: Does the Court anticipate jury selection taking a whole day?

THE COURT: Yes. Unfortunately, yes.

MR. CARLSON: Okay.

THE COURT: It may not.

MR. CARLSON: Yeah.

THE COURT: But I -- but I would be -- I would be surprised if it didn't.

MR. CARLSON: Okay. I have other questions. I think it would be more efficient if we discussed them with opposing counsel first.

THE COURT: Well, it's only 9:15.

MR. CARLSON: Okay.

THE COURT: I mean, I -- because here's what happened before. You had a question, and then Ms. Young said, Oh, we agreed on that. So it could be that you'll raise something as a possibility. And even though there hasn't been prior consultation, opposing counsel might say, oh, that's fine. And then that's -- that can be something that can come off the list.

MR. CARLSON: Okay. Both parties' exhibit lists, I think as is common, are substantially longer than the number of exhibits that can possibly get in -- be gotten into evidence at trial. We've stipulated to the admissibility of many of these exhibits, hundreds of them.

How does the Court want those stipulated exhibits introduced into evidence?

THE COURT: By a witness.

MR. CARLSON: Okay.

THE COURT: Who has some idea what the exhibit is, you know, has some basis of knowledge.

MR. CARLSON: Okay. So --

THE COURT: What we're not going to do for the most part -- I occasionally make exceptions to this rule -- is just say, oh, this is coming into evidence. There hasn't been a witness which has explained it, but we're just going to put it in evidence. And then later in closing argument, we'll find out what the story is. That's not going to happen.

MR. CARLSON: Okay. That's -- that's very helpful.

I think -- I think that's all the questions that we have at this time.

THE COURT: Very good.

Mr. Klaus?

MR. KLAUS: Thank you, Your Honor. Following up on one of the questions that Mr. Carlson asked, if the -- we're planning for jury selection to take all or most of the day on the 5th, are we -- should we prepare for openings to be on the 6th?

THE COURT: Yes. Openings will occur on the 6th. I mean, unfortunately, I had to make myself unavailable on Monday, and so our time is quite tight. And so I need to use every minute I can. If I thought there was a realistic

possibility of there being time for an entire opening statement on that Tuesday, I would -- I would plan for it, but I think Ms. Lee -- Ms. Lee's and my experience has been, taking folks in groups, as we have started to do post COVID, it just takes the whole day.

Let me go over that. Let's talk about the mechanics of that. I don't know if I -- did I do that already? How that works?

MR. KLAUS: I think we had -- we had some -- a few questions regarding the process of *voir dire*, just the numbers of folks coming in at a time, Your Honor, so we'd be happy to hear it again.

THE COURT: Yeah. We -- with some trial and error, Ms. Lee and I have established more or less a routine.

So we have 60 -- nominally, we have 65 jurors. There will be failures to appear. We can safely say that's three groups of 20 because at least five people will not show up.

So the jury office will send us three groups, and with respect to each group, the pattern will be the same. I will give somewhat lengthy opening remarks. I won't say much about the trial. I will not ask a lot of questions of our jurors unless there is something you want me to ask because you feel that if a lawyer were to ask the question, the prospective juror might hold it against the lawyer and so you want the Court to ask it. Otherwise, I know -- I have basic information

from our jurors in -- from these questionnaires.

So I would turn the questioning over to you, first the plaintiff and then the defendant.

Normally, I would allocate 20 minutes to each of you with your having the ability at the end of that time to say to me that you think there is good cause for more time. We have three groups. It doesn't sound like a lot of time. As you'll see, it actually is. It turns out to be. It's pretty much time. But in any event, we have to get the process finished in one day.

Probably we will need to take a lunch break, so we jam that in usually between groups two and three. We don't take very long because we've got a group of jurors waiting at that point.

After the questioning of each group is usually when I do hardships. It's not on its face the most time efficient way of doing it because, of course, you will have spent time -- we all will have spent time getting to know jurors who ultimately are going to leave. But I found that by doing it that way, it reduced the number of hardship requests because people are reminded about their civic duty in a way that, frankly, is usually effective for at least some jurors.

And they've gotten to know you, and they've heard -- through your questions, they've learned a little bit about the facts and some of them say, you know what? I'll postpone the

dentist appointment or whatever. So that's why I do it at the end. So we do the hardships. They're gone.

You make your cause challenges when they're gone. We don't do peremptories. And sometimes I -- I will have heard the hardship request, but often I will not have ruled on that yet because I want to know how -- in the aggregate, can I just grant them all? Or based on the numbers, do I need to deny some just to make sure we have enough possible jurors?

My philosophy about hardship requests is there is no percentage in being tougher than I need to be because if I do that, what I wind up with is a juror who is upset at being there. And they are going to be a less engaged juror, and they're going to be more concerned about their own personal circumstances and less concerned with the evidence that you're presenting and the claims that you're making.

So I wave the flag pretty hard during jury selection, and then once it actually gets down to it, I mostly grant hardships.

But as I said, it may be that I'll defer deciding all those hardships until the end of the process.

So we finish the first group. We've heard their hardship requests. You have made and I have ruled on any challenges for cause. We bring in the next group. We repeat the process. We bring in the third group. We repeat the process. Now, it's the end of the day.

Everybody's been qualified for cause. At that point, I deal with hardships. Now we have a group of jurors in numerical order. You have all the information that I have about the jurors, which will always be true, by the way. I'll never know anything you don't know. And I will say, here are the first nine jurors in order that are left. That's your jury.

And then we'll go back and forth, and you'll exercise your peremptories. And after each peremptory, I will again say, here are your nine jurors so that everyone has five or six opportunities to correct the Court if the Court has made a mistake about who's ultimately going to be in the box. That's how it works.

Mr. Klaus, other questions?

MR. KLAUS: I will ask Mr. Spiegel if he has any questions on the *voir dire* process.

MR. SPIEGEL: I think not, Your Honor. John Spiegel for defendant. That's a very helpful explanation.

THE COURT: Does anyone anticipate using demonstrative exhibits during their *voir dire*?

MR. CARLSON: No, not for plaintiffs, Your Honor.

THE COURT: Mr. Spiegel?

MR. SPIEGEL: No, Your Honor.

THE COURT: Okay. Very good. One less -- one less potential bone of contention.

Mr. Klaus, other questions?

MR. KLAUS: Your Honor, will you give the jury preliminary instructions before or after the opening statements?

THE COURT: Good question. I don't have a fixed practice. I do with closing instructions. I always do those before closing arguments. I want them to hear from you last.

I'm trying to remember what I did in that criminal trial we just finished.

Ms. Lee, do you remember?

THE CLERK: Your Honor, I was out for family --

THE COURT: Oh, that's right.

THE CLERK: -- for the beginning. Sorry.

THE COURT: I think probably before. Again, I want -- you know, it's recency and primacy, right? I feel like if you've done your opening statements, now we're off to the races. Now it's interesting. And for the Court to say let me talk to you about don't go on TikTok while you're a juror, you know, it just -- it interrupts the flow of the narrative. So unless anyone feels that I should do otherwise, I think I would just instruct and then turn the trial over to you essentially.

MR. KLAUS: That's fine with us, Your Honor.

MR. CARLSON: Yep. Plaintiffs are fine with that, Your Honor.

I have one more question about *voir dire*. I'm sorry.

It's 20 minutes per side or 20 minutes total?

THE COURT: Per side.

MR. CARLSON: Okay.

THE COURT: It's a lot of people, you know.

MR. KLAUS: Your Honor, we had -- we would raise and apologize for the length of the document, but in the final pretrial conference, there are a number of issues that, with notwithstanding the prior orders and our meet and confer efforts, the parties were unable to agree on.

We are happy to -- with respect to the majority of these, we can raise them today or wait. There were a few that would be relevant, particularly for opening statements in the beginning of the trial that we definitely would like to raise this morning.

THE COURT: Yes.

MR. KLAUS: And the first of these, which Ms. Young --

THE COURT: Oh, I see this now. I think I'm inadequately prepared for this morning's conference, frankly. I know it's not -- it's not generally done in my profession for judges to admit that, but I will just tell you, I sheepishly acknowledge to you that there are parts -- I assume you are referring to Docket 593.

MR. KLAUS: It's Docket 593, and there were a number of issues that were raised principally at Roman 15, which starts at page 22 -- it's numbered 22, but it's 23 of 56 of the

ECF docket.

THE COURT: Yes. I'm there.

MR. KLAUS: We had three issues -- three of those issues we were hoping to raise. Although, we -- if Your Honor is not prepared to address them, then we can --

THE COURT: I think what we ought to do is this, frankly. I mean, I have a summary judgment hearing a little bit later today in the afternoon, but not until the afternoon. I think we should take a break right now. I should read that portion of the statement. I would then be ready to proceed. And we could get back together again in an hour, 45 minutes, something like that. I can't imagine it will take that long.

MR. KLAUS: We don't -- we don't have anything else -- on our side, we don't have anything else to do today, Your Honor, so that's --

THE COURT: Let's do that. I would rather do this in a prepared way than to do, you know -- than do it sort of by pop quiz. You went to the trouble to lay these issues out for me and explain your positions. I think I should learn them.

MR. CARLSON: Your Honor, it would be helpful to know whether Mr. Klaus plans to raise some or all of the issues that are in section 15.

THE COURT: Okay. So bear with me just a moment. I'm going to turn my microphone off. I'm going to print that portion of the statement, and then when Mr. Klaus says which

ones it is that he wants to address, I can actually mark those on a paper. Otherwise, I'll have to rely on my memory, which I think is not a good approach. So as I said, I'll turn my mic off. I will turn it back on when I've got this thing printed or the part that I need printed.

(Pause in proceedings.)

THE COURT: You can still hear the hum of the printer in the background, but hopefully that will cease. I have printed out from ECF page 23 through the end of the document without the attachments.

So why don't we go through these, and let me find out -- I mean, let me find out whether there are any of these that are not -- that don't require discussions I think is probably the more sensible question to ask.

The first is evidence of post injunction -- excuse me -- injunction or post injunction conduct.

MR. KLAUS: We would like to address that, Your Honor.

THE COURT: The next is the parties' proposals regarding the SHST decisions.

MR. KLAUS: We would like to address that one, too.

THE COURT: Can I just say there is so much unnecessary argument in this portion of the document and rehashing of things that we've already talked about and sort of posturing, a word I rarely use, but I would just beg the parties to be a little more cognizant of the opportunity cost

of time.

Anyway, I don't begrudge you raising these issues for decision. That's not my point, and I apologize for not being more prepared. Anyway, okay.

This next thing is the vicarious liability instruction.

MR. KLAUS: We would like to -- we would ask Your Honor to hear that one.

THE COURT: Pre-authenticated business records.

MR. KLAUS: That would be helpful for -- to address today, Your Honor. That would expedite --

THE COURT: Shouldn't I just start reading? We're four for four, I think.

MR. KLAUS: I only have one more after that, Your Honor.

THE COURT: Is it plaintiff's evidence and testimony related to excluded topics?

MR. KLAUS: It is not.

THE COURT: Mr. Carlson, would you like the Court to address that issue?

MR. CARLSON: I don't think it's -- it's necessary to address that at this juncture.

THE COURT: All right. I will -- we will address that at some future time perhaps.

Section F, scope of -- is it Menache? I have never known how to pronounce it.

THE COURT: Scope of Mr. Menache's testimony.

MR. KLAUS: That was the last one that we had, Your Honor.

THE COURT: Mr. Carlson, would you like to address topic G, evidence of MOVA's ownership prior to August 2012?

MR. CARLSON: That is -- whether we would like you to decide that now?

THE COURT: Yeah. Later today. Don't be bashful. Mr. Klaus put a lot of things in the shopping cart.

MR. CARLSON: He did. Your Honor, these are -- these are issues for the most part raised by defendants, so --

THE COURT: I see.

MR. CARLSON: It's our position that this evidence should come in and --

THE COURT: No. No. No. Stop. Don't tell me what your position is. I'm just asking do you want me to decide it later today or not?

MR. CARLSON: Yes.

THE COURT: Okay. And then H, which is -- okay. H is plaintiff's untimely exhibits and designations. I feel confident that was not your header. Do you want me to address that?

MR. CARLSON: Your Honor, I believe this is still a moving target. I mean, the defendants informed us today that they're supplementing their exhibit list.

THE COURT: I'll take that as a no. How about plaintiffs other improper designations?

MR. CARLSON: Yeah. That wasn't my heading either, Your Honor.

THE COURT: I inferred that.

MR. CARLSON: Yeah. I -- I don't think it's necessary to address it today.

THE COURT: All right. We won't. Very good. We're going to go in recess until 10:30, and then we'll reconvene. Thank you.

(Recess taken at 9:17 a.m.)

(Proceedings resumed at 10:30 a.m.)

THE CLERK: Your Honor, now recalling CV 17-4006-JST, Rearden, LLC, et al. vs. The Walt Disney Company, et al.

If counsel could please just restate their appearances for the record, beginning with counsel for plaintiffs.

MR. CARLSON: Yes. This is Mark Carlson for the plaintiffs, and with me are my colleagues Garth Wojitanowicz and Jerrod Patterson. Also on the line is our client, Steve Perlman.

MR. KLAUS: Thank you, Your Honor. Kelly Klaus from Munger Tolles & Olson, and I am joined on the line by my colleagues, John Spiegel, Blanca Young, John Schwab, Stephanie Herrera, Shannon Aminirad, and Anne Conley.

THE COURT: Very good.

Well, I'm much better prepared than I was before, and I thank the parties for their indulgence.

I'm going to say something that you already know, but I'm going to say it anyway. The deafening noise in the back of the mind of every judge at all times is, Whom can I trust? Whom can I trust?

You know your case. Now, imagine if you had 300 cases. Think about the average amount of paper that is filed in every case, the number of citations to the factual record, the number of citations to prior cases, legal cases, and ask yourself how much weight it would need to put on what the lawyers are telling you.

How great it would be the first few times you went to check on what somebody had said about a case or what somebody had said about some evidence and find out each time that it was exactly right. Your shoulders would come down.

Now ask yourself what would happen if you went to look, and that's not exactly what the case said. Or you read a declaration that had been cited to you, and you found that the declaration was quoted accurately but that the quotation omitted other language which changed the meaning of the declaration. And what your reaction would be the next time that lawyer said something to you and you wanted so badly to be able to take it on faith.

Why do I say that? Well, we've had lots of experience

together. And the needle is wherever it is. But that needle is always capable of moving one direction or the other, and we're about to start moving at very high speed.

And the moment I feel that I cannot trust one hundred percent what somebody is telling me, my train of thought as to whatever you're saying will stop. It will need to stop because if I can find the time, I'm going to have to go off and verify whatever it is you're telling me. And the good news is that if you do say -- for example, if I say, you know, does the case exactly say that? You say, well, not exactly. And you qualify it, and you make it a hundred percent accurate, even though that may not feel good in the moment, your credibility with the Court is going up more than I can tell you.

So, anyway, you all know this already. I'm not trying to be schoolmarmish, but if you would bear this in mind while we go through this process, we'll all be better off.

Okay. Let's turn to the topics in this pretrial conference statement. We'll just take them in order.

The first is capital letter A on page -- ECF page 23, evidence of the injunction, post injunction conduct. This is really in the nature of a motion in limine by defendant. So, Mr. Klaus or Mr. Spiegel or someone on your team, I'll let you go first.

MR. KLAUS: Your Honor, thank you. Ms. Herrera of our

team of be arguing this.

THE COURT: Very good. Ms. Herrera?

MS. HERRERA: Good morning, Your Honor. I'm happy to address whichever portions of the arguments in the papers Your Honor is most interested in. I think since we filed the papers, Your Honor has issued a few rulings that let us know what the Court's view is on the relevance of the injunction. So I'd like to focus just briefly on the post injunction conduct, which we think raises different issues.

In the summary judgment order, Your Honor ruled that Rearden has no claim for vicarious liability for post injunction conduct. Plaintiffs appear to misunderstand that as a ruling about damages, but our understanding of the ruling is that the claim is out for post injunction conduct. Defendant cannot be liable for post injunction conduct.

And so for that reason, we think evidence of DD3's post injunction conduct is not relevant. But at a minimum, it raises serious issues under Rule 403 because it would be incredibly confusing and misleading for the jury to hear extensive evidence and testimony about conduct for which defendant cannot be liable. And so at a minimum under Rule 403, we would ask Your Honor to exclude evidence and testimony on that topic.

THE COURT: All right. Thank you.

Mr. Carlson?

MR. CARLSON: Yes, Your Honor.

The motion is really directed towards a handful of emails and then some testimony that relates to those emails. And what the emails reveal is that on June 28 of 2016, 11 days after the Court had issued the injunction, Darren Hendler at Digital Domain broadcast to a large number of people at Digital Domain his, quote, Beast MOVA plan, close quote.

And in that, he told them all that Mr. LaSalle was busily working with MOVA to create scans. That's the first stage of MOVA processing. It's a clear violation of the Court's injunction.

The reason why this is relevant is twofold. The first is this has to do with -- with Mr. Chow's testimony. The Court has already ruled that Mr. Chow's post injunction conduct is relevant and admissible, and that is in document 604 at page 2.

And the reason why these are related is because while Mr. Chow was sitting on the news of the injunction and not passing that information on to the people in production at -- on *Beauty and the Beast* at the same time, that is when Digital Domain's -- was busily violating the injunction by making copies. So what this does is it puts the necessary context on Mr. Chow's failure to alert the company that the injunction had been issued.

But the second point -- second reason why this is relevant has to do with Disney's claim that MOVA had no effect, had no

effect one way or the other on the animation of the Beast because hand animation and MOVA animation are fungible. They're completely undiscernible, and so no -- it has no effect on the audience, on the appeal of the movie, and to be disregarded.

Well, Digital Domain's MOVA Beast plan that Mr. Hendler proposed was, how do we do this? How do we complete these scenes without the MOVA tracked mesh? So they were trying to do that, but at the same time, they had Mr. LaSalle making the scans using MOVA. And the reason why they did that, we believe, is because they did not trust hand animation. And they were afraid that if they had completed these scenes and presented the results to Disney using hand animation, that Disney would not be happy with them, and Digital Domain would be up against a deadline. It would miss its deadline to process these.

So they had the scans done as a backup because they did not trust hand animation, and that means that hand animation and MOVA animation were not fungible in their eyes.

MS. HERRERA: Your Honor, may I respond just very briefly to those specific points?

THE COURT: Yes.

MS. HERRERA: I have just three points which I think go to both of Mr. Carlson's argument.

So the first is that the emails he describes are all

internal DD3 documents. No one at Disney is copied on them. Mr. Chow is not copied on them. Every Disney witness who was asked about them in deposition testified that they had never seen them and had no awareness of what DD3 was doing. So this is all hearsay, which is sort of a separate issue that Rearden is not going to be able to get into evidence.

But with respect to what defendant knew or was thinking or the actions it took, the undisputed record evidence is that Disney had no idea what DD3 was doing.

And then the second point is that, as Your Honor ruled in the summary judgment order on page 12, there is zero evidence that any of the shots that were processed after the injunction by DD3 made it into the movie. So with respect to this argument about the superiority of MOVA overhand animation and motivations for continuing to process files after the injunction, none of those files made it into the movie --

THE COURT: Why is -- let me ask you this question. Why does that matter as a matter of logic? Let's say, for example -- I'm going to have to choose an artist who is no longer alive, unfortunately, for my hypothetical. I'm going to pick Picasso. Let's say that I -- so the Court puts me in charge of painting the side of the courthouse building. And one possibility is I could have Picasso do it, and, you know, it would be beautiful. It would be all kinds of representations and things.

And the other would be that I would have Frank do it, and Frank just has a spray gun. And he would just spray the side of the building with one color of paint. And later in litigation, there turns out to be -- never mind. That hypothetical is going to consume our whole morning.

I'll just use the facts as Mr. Carlson described them. If his point is Disney is going to make the argument that MOVA was not special, that -- that -- that at least to some extent, MOVA was interchangeable with hand animation and therefore not valuable, isn't it -- regardless of the timing and the chronology, why isn't it relevant on that point that DD3 expresses the concern, oh, my goodness, we can't use MOVA anymore? And why is that irrelevant? I don't understand.

MS. HERRERA: So I think, Your Honor, I would have two responses to that.

One is I don't think there is an email that says that. I think we can look at the emails and present them to Your Honor, but I think the description that there is some discussion in there about oh, my goodness, we must use MOVA, we can't hand animate is not what the evidence says. But I'm happy to pull up the documents, and we can discuss it.

And then the second point is that Disney did not ask DD3 to do that, and so this question about what Disney believed --

THE COURT: No. No. No. That's -- but that's why I -- that's why I wanted to have this conversation with you.

That's a separate question. Disney's knowledge is a separate question. $10 is worth more than $5. Okay? Whether Disney knows it or not. And if there issue -- a dispute about which one is more valuable, the knowledge of Disney is a separate question. That's where I'm going with all of this.

MS. HERRERA: I understand, Your Honor. I think we believe that Disney's knowledge is still relevant to that point because Disney's testimony is that it could have used hand animation to finish the couple of shots that were outstanding. But I understand Your Honor's --

THE COURT: Then why isn't it impeaching that its own contractor felt otherwise if that's what the evidence shows?

MS. HERRERA: So, again, Your Honor, we don't think that's what the evidence shows. But even if Your Honor thinks there is relevance, which I understand you to be saying, we still have serious concerns about the prejudice to Disney of having all of this evidence about post injunction conduct be front and center at the trial when Your Honor has ruled that Disney cannot be held liable for that conduct. It will be confusing to the jurors. It will consume a lot of our time explaining to them that Disney did not know about any of that conduct, and it is inflammatory.

It creates a risk that the jury will want to punish someone for DD3's violating the injunction, and there is no evidence that Disney had anything to do with that or any

awareness of that. So that would be our pitch to Your Honor, that even if there is relevance, it should be excluded under Rule 403.

THE COURT: Mr. Carlson, last words on this.

MR. CARLSON: Just this. It really isn't necessary to our point that the -- that the email says, "Oh, my gosh, we can't animate without MOVA." I think the email speaks for itself. Mr. Hendler announced to a wide number of highly placed people in Digital Domain that Mr. LaSalle was using MOVA, and this was 11 days after the injunction. And they wouldn't have done that if they didn't think they needed to.

THE COURT: They say it very quickly, but they do say "hearsay" in their portion of the case management statement. Do you want to address that?

MR. CARLSON: Yeah. That's not -- well, okay. It -- it's not -- it's not hearsay. It's written by Mr. Hendler, and Mr. Hendler gets it into evidence. It's -- it's his own writing. It's his own email.

THE COURT: I have a feeling the fact that he said it is going to turn out to be legally relevant also as opposed to the facts contained in the email itself. But anyway, I don't have the email in front of me.

All right. I need to take a look at my summary judgment ruling at Docket 555 at page 12. That seems to me fundamental to Ms. Herrera's argument, so I'll do that.

So let me just take that under submission.

Let's turn to capital letter B, which is the parties' respective proposals regarding SHST decisions. I'm sure I'm going to wind up taking this under submission because it has to do with the wording of a jury instruction.

One question that I had was that defendants propose a separate instruction regarding the preliminary injunction order. I didn't see in here -- and perhaps I missed it -- that the plaintiffs propose an instruction on that topic. Do they?

MR. CARLSON: Your Honor, I -- I have it in my -- in my papers here. Let me just -- it's in 606-1, and it's page 2 of 2.

THE COURT: Okay.

MR. CARLSON: It's actually a single page. So this was, I guess, attached to something else. But it's 606-1.

MS. YOUNG: Your Honor, this is Blanca Young on behalf of defendant.

There was an inadvertent error where that got omitted by mistake from the filing. And instead of having that at -- the instruction about the SHST decision was put in, so there was an errata on it.

THE COURT: Right. I'll just print that out.

Okay. Mr. Carlson, argument -- oh, darn it. Now this printer is going to make noise for a second. I'll just use these headphones.

There. Now I don't have to worry about it.

Mr. Carlson, argument regarding these instructions.

MR. CARLSON: Yeah. Your Honor, I don't know what to say in terms of argument. I think this is a matter of the Court reviewing the two submissions by the parties and determining which is -- is fair and balanced.

To me, having reread these just a half hour ago, it just seems very obvious. I think our instructions very closely follow what the Court's ruling was, and they take into account the *Boulware* case, which says that the ruling in the fire -- prior proceeding is relevant and admissible. And so that -- the information that we are providing the jury regarding the SHST result and the appeal is information that should -- the jury should consider in addition to what they hear at trial.

And our instruction makes all that clear. They should make up their own minds. Disney is not bound. They should listen to the evidence presented at trial, but that evidence does include the instruction to the jury. That's why we're providing it. And so that's -- that's evidence that they should consider as well.

The differences between ours and their proposal is they barely touch on the SHST decision, I think a sentence, maybe two, and barely touch on the appeal. And then all the rest of it is this huge cautionary instruction about don't listen to that. And I think it's just clearly contrary to *Boulware*,

right? What they're trying do is argue to the jury in a statement read by the Court that they should not consider the result of the SHST case and the appeal. And that is -- it's wrong as a matter of law, and it's just very clearly argumentive.

The differences between the parties' proposed instructions on the preliminary injunction order are narrower, but I think they're of the same -- substantially the same nature. And what they are trying to do is spend -- is devote most of the instruction to -- to telling the jury why the order doesn't mean anything and should be disregarded.

I think that's just weighing the evidence for the jury coming from the Court, which would be very improper. They should simply be told the facts of what was decided and -- and that there is -- there's no liability for post injunction infringement but that they may consider that evidence for any other relevant purpose.

THE COURT: Thank you, Mr. Klaus.

Who will be arguing this point for Disney?

MR. KLAUS: I'm -- that's Mr. Spiegel.

THE COURT: Mr. Spiegel. Mr. Spiegel, your microphone is muted.

MR. SPIEGEL: Are we turning to topic C, Your Honor, vicarious --

THE COURT: No. I haven't heard from your side yet

about B, I don't think.

MR. KLAUS: I'm sorry. I thought we -- B is still Ms. Young who had spoken the first time, Your Honor.

THE COURT: Oh, I take it back. Yeah.

Ms. Young?

MS. YOUNG: Thank you, Your Honor.

So let me start from a point of agreement. During the break, the parties met and conferred about when these instructions about the SHST decision should be given to the jury. We feel it's important before the jury hears openings that they be informed about what they will likely hear in opening regarding the Court's decisions in the SHST case. And the parties have agreed that whatever instruction the Court decides to give about both the SHST decision and the preliminary injunction order should be part of both the preliminary instructions the jury is given as well as the concluding instructions at the end.

And then I'd like to just briefly respond to the substantive issues that Mr. Carlson raised, and we've laid all of this out in our papers. But there are some important issues with respect to the proposals that the plaintiff -- the plaintiffs have made on both of these instructions.

So on the SHST instruction, we understood the purpose of that to be an attempt by the Court to strike a balance between advising the jury about the outcome of the SHST proceeding and

trying to mitigate some of the prejudice that would inherently come in by the jury being informed that a Court has already decided one of the issues the jury will be asked to decide in the case.

And, therefore, we think the way to strike that balance is to have as concise a statement as possible about what the Court decided without bringing in unnecessary detail about what happened in the litigation or the facts of that litigation.

So, for example, in the plaintiff's proposal, there is a lot of verbiage about the contentions that were being made by the parties on the SHST side of the case. It's repeated again when it talks about VGH substituting in for SHST, and then it concludes by saying, essentially, the Court disagreed with that and concluded the opposite of what those parties were advocating.

We think that's unnecessary, and we think it raises with it both implications about what the Court found as a factual matter rather than a concise statement of the outcome and also suggests that the Court did not find that evidence credible.

Another issue related to that is there is --

THE COURT: Can I ask you a question?

MS. YOUNG: Yes.

THE COURT: If you knew that I was dispositionally a baseball arbitration decider, is there any part of Disney's proposed instruction you would -- would you still stand behind

every phrase in Disney's proposed instruction?

MS. YOUNG: No, not necessarily. I think there are parts of that --

THE COURT: Let me ask you a question. Can you think of any other jury instruction that you have ever seen actually given in a trial that tells the jury they should not defer to some particular evidence in the case?

MS. YOUNG: Well, I --

THE COURT: You should not -- you should not defer to any decision in that case. If the decision in the case is evidence, I'm telling the jury not to defer to a particular piece of evidence, am I not? My point is simply this. We don't have to agree or disagree about the comment I just made. This instruction is very argumentive, I think.

MS. YOUNG: Understood, Your Honor. I do think it's important for the jury to understand that the decision ultimately is up to them, and the language about not deferring to another decision comes from the ***Engquist*** case where the Court specifically noted the risk that that could happen if a jury is informed of a prior decision. So that is what we were trying to avoid with this instruction.

THE COURT: Understood.

MS. YOUNG: So just on a couple of other points that I think are unnecessary in the proposal from the plaintiffs, there is a long procedural history in that instruction about

SHST disappearing from the lawsuit.

THE COURT: Yes. I'm not going to use the word "disappear" either.

MS. YOUNG: And there is also a quote from the Court's decision that we think is misleading and incorrect in the context of this case. It quotes the Court's decision that Rearden, not DD3, owns and at all relevant times has owned the MOVA assets. There are relevant time periods in this case when Rearden did not own the MOVA assets. And so we believe it would be misleading to suggest to the jury that here Rearden owned the assets at all relevant times.

THE COURT: Mr. Carlson, I saw that point in the case management statement.

MR. CARLSON: Yes.

THE COURT: Do you want to rise in defense of the phrase "at all relevant times," or can we just take that out?

MR. CARLSON: We can take that out, yeah.

THE COURT: There we go. Okay.

Ms. Young.

MS. YOUNG: Thank you, Your Honor. Those are the -- those are the main points I wanted to make on that instruction.

On the preliminary injunction order instruction, I think the parties agree -- again, I'll start from points of agreement that we have. I think we agree that the jury should be told the preliminary injunction order directed DD3 to stop using

MOVA. We agree that the jury should be told the preliminary injunction order did not decide who owns the MOVA assets. And we agree that the jury should be told that it has been decided earlier in this proceeding that Disney is not liable for any infringement that may have occurred after the injunction.

And that goes to the point Ms. Herrera was just arguing, which is that, in fact, the Court has found there is no liability after the injunction. So we think it's quite important for the jury to understand that Disney cannot be found liable or have damages assessed against it for any conduct occurring after the injunction.

There is -- again, there are some statements in the proposal from the plaintiffs that I just wanted to flag because, again, I think it -- it brings in irrelevant issues into the case. And in particular, there is a statement in their proposal that in the preliminary injunction order, the Court ruled that the transfer from SHST to VGH was fraudulent. It's not clear why that question is relevant to anything the jury will be asked to decide --

THE COURT: Let me stop you. Let me stop you.

Mr. Carlson, why do I need that?

MR. CARLSON: Well, the parties were setting forth in their respective proposals what the Court decided about ownership, and it's -- everybody agrees you didn't decide the fundamental ownership issue that was decided at trial.

THE COURT: Right. It's not that second sentence I'm focused on. It's the first one.

MR. CARLSON: I understand.

THE COURT: The word "fraud" tends to light people up and be a magnet for people's attention.

MR. CARLSON: I understand that.

THE COURT: And your opponent's point is it's not at issue in the case. Then why is that wrong?

MR. CARLSON: It's -- it's -- well, it is at issue, whether VGH owns the MOVA assets.

THE COURT: No. No. It's fraudulent. It's the fraudulent transfer part. That's what I'm talking about.

MR. CARLSON: I was sensitive to that, Your Honor, when I was drafting this, but that is, in fact, what the issue was. It was a ruling on the fraudulent transfer --

THE COURT: Yes, I understand that. But applying *Boulware*, why is it an issue in this trial? I know it was an issue in that order. That's why it's in there.

MR. CARLSON: The reason why it's -- it's relevant and at issue is because the question is whether SHST's transfer to VGH was effective. And this was a ruling where the Court said that we were likely to succeed --

THE COURT: Yeah. Let me -- well, okay. I keep interrupting you, so I apologize for that. You can finish your argument, and then I'll tell you what my concern is when you're

done.

MR. CARLSON: Your Honor, I -- I'm done.

THE COURT: My concern is this. *Boulware* says when a court has finally decided something, that's relevant. This sentence says two things that are problematic to me.

One is that it introduces the question -- it introduces the concept that the transfer itself might have been fraudulent. That's not an issue in our trial. It's just calling somebody a word that is associated with bad actors for no reason that I've heard you say or that I saw in the statement.

The second is that it says the injunction order ruled that Rearden was likely to succeed, which is a poor fit with *Boulware*. I'm not aware of any authority that makes it relevant that a court ruling that somebody is likely to succeed on something gets to be evidence in a second trial.

So those are my concerns. If you want to respond, you can. If your preliminary injunction -- if the version I wind up marking up is yours and not the defendant's, that sentence, the whole sentence is likely to go out.

MR. CARLSON: Yep. Yep. Your Honor, I think as I indicated, I was sensitive to the load that those words carried when I drafted this.

This sentence is drafted this way because I was trying to have as much fidelity to the Court's decision as I possibly

could, but we're not wedded to the fraudulent transfer.

I think if you're going to -- if you're going to state that the injunction did not resolve the -- who owned MOVA, I think it should state what the -- what the injunction did say on that point. And that's that -- in words to the effect that Rearden was -- was, you know, had shown or whatever that the transfer to -- from SHST to VGH was not effective. It just balances the statement that it didn't decide the fundamental ownership issue. And, you know, frankly, we're not wedded to any of that language.

THE COURT: All right. Ms. Young, I think I interrupted you to ask Mr. Carlson a question.

MS. YOUNG: No. And I would just respond to what he just said by saying the efficacy of that transfer also is not at issue in the case. The question is whether Rearden is the owner of the MOVA assets.

There is another statement in the proposal from the plaintiffs on the preliminary injunction order that I also wanted to address, which is this statement that VGH was ordered to serve a copy of the injunction order on defendant. That may be relevant if defendants' conduct after the injunction were at issue. It is not. The Court has ruled that we're not liable for any of that conduct, and so I think it's quite confusing to provide that instruction to the jury.

THE COURT: All right. Submitted?

MR. CARLSON: I was just going to say, I think we already discussed that with respect to the previous issue. The post-injunction conduct is relevant. It is -- you know, we do not get damages for that. But it is relevant to other issues. And the fact that Digital Domain was ordered to serve it on Disney, and then Mr. Chow received it and then chose not to disseminate it to the production team on *Beauty and the Beast*, all of that ties together. And I think it's relevant and admissible and should be in the instruction.

THE COURT: Thank you, Mr. Carlson. Submitted?

MR. CARLSON: Yes.

MS. YOUNG: Yes, Your Honor.

THE COURT: All right. Let's turn to the next one.

MR. PERLMAN: May I say one small thing?

THE COURT: No. You may not. You can text your lawyer and see if he wants to say it.

MR. PERLMAN: I will do that.

THE COURT: He's representing you in this proceeding, Mr. Perlman.

MR. PERLMAN: Thank you.

THE COURT: Mr. Spiegel, I think at long last, we have arrived at capital letter C.

MR. SPIEGEL: Thank you, Your Honor. We are requested, Your Honor, that the Court add two words to the model instruction on the element of vicarious infringement that

says that the plaintiff must prove that the defendant had the right and ability to control or supervise the infringing conduct.

We think in conformity with Ninth Circuit law and Your Honor's motion for summary judgment ruling, we should use the formulation of the Ninth Circuit, which is the defendant had the legal right and practical ability. And the word that really matters there, Your Honor, is "practical ability." "Legal right," if Rearden objects to that, we're okay just leaving it as "right," although "legal right" is what the Ninth Circuit standard is.

"Practical ability" is a very important instruction to give to the jury, and I think Your Honor's summary judgment ruling reflects that at pages 11 and 12. Your Honor says the issue --

THE COURT: I do have some concerns with a jury determining a legal right.

MR. SPIEGEL: Then let's --

THE COURT: And I would ask whether any of those present think it's a good idea to have jurors decide what the law is. I don't sort of doubt it.

MR. SPIEGEL: I'll withdraw it, Your Honor. It was from the Ninth Circuit formulation. So as I say, the real issue here is practical, practical ability. Your Honor defined the issue we're trying in this case is whether Disney had the

practical ability to limit or control DD3's use of MOVA. Pages 11 and 12 make that clear. Your Honor says again on page 12 --

THE COURT: Yeah, I'm actually going to stop you because I think you might have the wind at your back on this a little bit.

Mr. Carlson, what's the prejudice to you of having to prove that they had the practical ability to control the conduct? Why is that -- first of all, I'm not -- I do -- I wonder whether Mr. Spiegel's wrong, and I should -- I wonder whether he's wrong. And why is that unfair to you?

MR. CARLSON: Yeah, Your Honor, I think it's -- to get to the point of why it's unfair, I think that "practical ability" is something that any lawyer would recognize is a gloss on the word "ability." And it's one that we would send lawyers and judges scurrying off to the cases to study and find out what the boundaries of a practical ability are.

And -- and I don't think the jury is equipped to determine what ability is practical and what is not. Is it a matter of -- if its -- if it requires walking across the street, is that practical? Is it -- is it practical if you're in the middle of your lunch when that's going on? What are the boundaries on the word "practical"?

I think as lawyers and as a judge, we all recognize that that word requires some context, and I think the jury is

ill-equipped to determine what is practical and what is not.

I think if we then look at the cases, right, to try and find out, what we find is that in the Ninth Circuit, the standard formulation is exactly what is in the pattern jury instruction, the right and ability to control. And, in fact, that comes from the Supreme Court, so that language, that formulation is -- is the standard. However, there have been cases where the -- the issue of the practicality of the ability to control was at issue. And the comments that are the source --

THE COURT: And do you -- and do you make that distinction because you contend that the practical ability of Disney is not at issue in this case?

MR. CARLSON: I -- I -- yes. I -- I think whether it was practical for Disney to pick up the telephone and call Mr. -- Mr. Perlman or use the email address that they had -- they had the telephone number. They had his email address -- to just call and say, We saw this in the *Hollywood Reporter*. You say that DD3 doesn't have a license. Should we be concerned about that? That -- it's literally that level of effort.

When you look at the cases that the comments cite that say in certain cases it may be appropriate to instruct the jury on practical ability, those are cases where it has to do with the technical ability to -- to -- to detect and to prevent

infringement. And that's --

THE COURT: Do you have a copy of the case management statement handy?

MR. CARLSON: I do -- oh, the case management statement?

THE COURT: Yeah. This is the one that lays out all the issues we've been discussing. Do you have that?

MR. CARLSON: Yes. Yes. Yes. I've got it right in front of me.

THE COURT: So the bottom of page 39, which is ECF page 40, there is a Footnote 9. Do you see that?

MR. CARLSON: Yes.

THE COURT: And it contains -- oh, I don't know -- roughly a dozen cases -- I haven't counted them -- all of which defendants say stand for the proposition that lots of cases that don't use online infringement use the "legal right" and "practical ability" language.

And my question for you is -- because everyone on both sides is saying to me, Oh, you just have to do what the Ninth Circuit always does, but then -- but you don't agree on what they always do.

If I ask somebody to read all those cases or I take the time myself to do it, will they have -- will it turn out that they've been miscited to me?

MR. CARLSON: Does the Court want me to address that

point, Your Honor?

THE COURT: I do.

MR. CARLSON: Okay. In the time that we've had available, I have not been able to read this entire -- all of the cases that are in this string cite. We have, in previous briefs to the Court, submitted string cites of the standard formulation of right and ability.

What I was able to do was pull the Marvin Gaye case which they cite in the body of their brief and review that. And they are correct that the Marvin Gaye case cites the *Perfect 10* language when it's citing the formulation of the rule.

THE COURT: Yes. This is in Footnote 8 on page 38. Yeah.

MR. CARLSON: Yeah. It's -- yes. Well, it's on page -- it's cited in the body of the brief. It starts -- yeah. I'm sorry. You're right, Your Honor. It's in Footnote 8.

And in the Marvin Gaye case, it does state the -- the right and ability language that comes from *Perfect 10*, but the practical ability to control is not at issue anywhere in that case. It cites that formulation, and then it moves on to -- to other issues, and there is no analysis of -- of what the -- what an ability needs to be in order to be practical.

The cases that provide that context are the ones that are cited in the comments of the -- of the jury instruction, and

those are *Perfect 10* and -- but -- oh, it's the *Visa* case. And those two cases are ones in which it had to do with the technical ability of the defendant to -- to control. And that's just simply not at issue in this case.

THE COURT: All right. Mr. Spiegel, what's your favorite case in Footnote 9, if you have one?

MR. SPIEGEL: Well, Your Honor, we would say the cases that we've cited in our lead briefing --

THE COURT: That's not the question.

MR. SPIEGEL: Okay.

THE COURT: You can say "I don't know."

MR. SPIEGEL: I understand --

THE COURT: The question I asked is -- excuse me, sir. The question I asked is what is your favorite case in Footnote 9. It's a softball. If you have one?

MR. SPIEGEL: *Range Road*, Your Honor, the first one cited.

THE COURT: Thank you, sir.

MR. SPIEGEL: May I further respond, Your Honor, to Mr. Carlson?

THE COURT: Please.

MR. SPIEGEL: Practical ability is exactly an issue that the jury is well qualified to decide, Your Honor. So it is exactly the issue that Your Honor has identified for trial here. The jury is to decide what's practical.

And in terms of legal citations, Rearden's own briefing in opposing our summary judgment motion on vicarious infringement used the practical ability standard.

THE COURT: Yes, I saw that.

MR. SPIEGEL: Your Honor used it in your ruling and, of course, we used it. That's the law. Practical ability.

And even the cases that -- that Rearden cites in the pretrial conference statement, the *Zillow* case, for example, they use -- that case uses practical ability as well.

And the reason why it's important in this case -- I'm sure Your Honor realizes -- is for Rearden to be left to argue, well, you know, Disney is a giant company. They have the ability to do a million different things, hire tons of law firms to go audit the vendor's software licenses and so forth. That's not the law in the Ninth Circuit or anyplace else.

So we think practical ability is the core issue for trial in this case, and I think Your Honor has said that in the summary judgment motion.

THE COURT: Gentlemen, I think we have placed as much weight on this one word in one jury instruction in this large case as it could possibly bear, and we're going to move on to capital letter D.

MR. CARLSON: Your Honor, Mr. Patterson is going to address this point.

MR. KLAUS: And Ms. Herrera will present for us, Your

Honor.

THE COURT: Very good.

Good morning, Mr. Patterson.

MR. PATTERSON: Good morning, Your Honor.

THE COURT: So my questions for you are two.

First, why is *Lomeli* wrong? And in your papers, you say, well, in that case, you know, the third parties did -- they did have third-party declarants. But my question would be isn't Disney's declarant here, whose last name I forgot to write down, in the same position as the declarant called Mulcahy, M-U-L-C-A-H-Y in *Lomeli*. But I think the more important question is doesn't the case *Lomeli* cites, which is *MRT*, basically make this argument for Disney in a way that's convincing? Those are my questions for you.

MR. CARLSON: Well, Your Honor, the difference between *Lomeli* and this case is that in *Lomeli*, the declarants had the actual information and knowledge to submit the declaration. And the declaration from Ms. Stankevich, she simply doesn't have the foundation, or at least she didn't establish the foundation in her declaration that she had information about how these third parties collected information and if they were done by persons with knowledge of their contents. It is simply not there.

THE COURT: Okay. Have you, by any chance, read the *MRT* case which, out of fairness to you, I will say I don't

think any party cites, but the *Lomeli* court cites?

MR. PATTERSON: No. I think both parties discuss *MRT*, Your Honor.

THE COURT: Oh, you do, actually. There it is, quoting *MRT*. I take it back.

MR. PATTERSON: Yes. Well, I would submit that first of all, the Ninth Circuit's analysis in MRT is very succinct. It doesn't really explain its reasoning. And I think it's unique facts because there, it was about whether the client could rely on the accuracy and reliability of law firm bills that the client itself had to pay. And so --

THE COURT: Right.

MR. PATTERSON: And so I think that those are unique circumstances because, of course, the client has to rely on the accuracy of law firm bills that the client actually pays.

THE COURT: Well, anticipating an argument I would expect Ms. Herrera to make, what happened in *MRT* is that, as you say, the client engaged a law firm, they got bills from the law firm, and they had to rely on the information that was put together by somebody else. And they didn't know how it was put together, but they had to rely on it.

As I understand the information here, it consists of something like marketing documents that were prepared by a third party that Disney engaged. And I would assume that when somebody hires a marketing consultant, it's very similar to

hiring a law firm. They're going to get this information from them. They're going to rely on it. That's what they paid them for. So I need more help from you in understanding what the meaningful distinction is between what happened in *MRT* and what we have here.

And on the point that *MRT* court could have said more about why they did what they did, I'm just a trial judge. So when the Ninth Circuit says, do it this way, I just do it that way.

MR. PATTERSON: Well, I don't think the Ninth Circuit provided enough guidance to the district court to -- to Your Honor in making this decision because I don't think the Court identified what are the specific unique factors that would allow one business to get in another business' records. And so I think that's the issue. And I think it's certainly a case-by-case decision.

THE COURT: Well, here's -- it's a little more complicated than the sentence you just said. What you just said is that would allow one business to get in another business' records. But I think to make that sentence complete, the question is, what is the rule about when a business is itself in possession of records created by a third party that it asked for or paid for -- what's the rule in that situation. And I don't know.

I have *Lomeli*. I have *MRT*. Is there a case that says -- I don't think there is authority in the plaintiff's section of

this part of the case management statement.

MR. PATTERSON: Right, Your Honor. This was written in the course of about an hour pending the deadline for submission of this. I would be happy to research this further for the Court.

I also think it's a document-by-document decision in the sense that some of these marketing surveys contain hearsay within hearsay. In other words, there's surveys of individuals who have seen the movie. A 12-year-old girl in Kansas says, "I went to the movie because I like Belle, and Belle is the reason I went to the movie." And so I anticipate Disney trying to offer this, perhaps even in its opening statement, for the truth of the matter, that that's why people went to see the movie.

So even if the Court is skeptical of our argument regarding Disney's ability to establish foundation on hearsay, I still believe that it's a document-by-document decision.

THE COURT: Ms. Herrera, I did some of your work for you already.

MS. HERRERA: Yes, you did, Your Honor. I think Your Honor has hit on the key points. As far as what the test is for a circumstance like this where a party has asked a third party to prepare records for it that it relies on in the ordinary course of its business, the test is MRT. And this is quoted in full in *Lomeli* which we cited first because I think

the facts are quite analogous.

But the rule is, in this circuit, records a business receives from others are admissible under Federal Rule of Evidence 8036 when those records are kept in the regular course of that business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records.

THE COURT: In the interest of time, I'm going to jump over that point because I think you're going to win that. What about the hearsay within hearsay?

MS. HERRERA: So that's the first time we've heard that argument, Your Honor. I don't believe there is hearsay within hearsay within these documents. I would have to look on a document-by-document basis.

I believe the exhibits that plaintiffs are holding out on here are sort of marketing research strategy reports, like higher level strategy, but I would have to look at it. There may be hearsay within hearsay. And I think for those, we're not offering them for the truth of the matter. We would have to do that on a document-by-document basis.

But the question here is whether these are business records that we have authenticated through a declaration that satisfies the requirements of Rule 90211. Ms. Stankevich is a senior vice-president of marketing at the Walt Disney Company. She knows and has established that these are the types of

records that Disney relies upon in producing and distributing its movies. And the practical import of this issue, Your Honor, is that if these -- if these exhibits don't come in as stipulated business records, we will have to call Ms. Stankevich as a witness for the sole purpose of repeating what she says in her declaration, which is not a good use of the jury's time or our time --

THE COURT: Well, I don't think we need to get into that, but I will just tell you, I don't know why you would do that. If Court ruled that her declaration testimony was insufficient to establish these as business records, having her say the same thing live I don't know would make a difference, would it?

MS. HERRERA: I -- I take Your Honor's point. I think we would also update the declaration to address whatever deficiencies Your Honor found, but that -- that's the concern here with these records.

THE COURT: Okay. Whoops. It says Mr. Carlson still, so I apologize, counsel, but I need your name again.

MR. PATTERSON: Certainly. It's Jerrod Patterson. We're all in the same room here.

THE COURT: That's fine. Mr. Patterson, last words on this topic.

MR. PATTERSON: Well, there's a second set of documents that are at issue, Your Honor.

THE COURT: I don't know. I'm on this -- I'm on this same business records capital letter D part of the case management statement. And my question for you, having -- you're already having made an initial argument is whether you have any further argument now that you've heard from Ms. Herrera.

MR. PATTERSON: Yes, Your Honor. There is a second group of documents under capital letter D, and that's a series of TV ads that Disney seeks to introduce. And when we were conferring with Disney, we said that we would stipulate to their authenticity, not admissibility, but authenticity if they submitted a declaration that the ads were actually aired. And the -- the declaration actually just said that they were used to promote the movie and not -- not aired.

But the more important point here is that we still object on relevance grounds. What -- what we have is at least 50 different ads that there's no context for, when were they -- they were aired, to what demographics they were aired. So I anticipate Disney is going to try to move into evidence 50 ads and then use the ads that favor their side and say, you know, that this was the cornerstone of the Disney's promotional campaign. But without any kind of context through the use of the ads and running the ads, there is simply no way to establish their relevance.

THE COURT: Ms. Herrera, how many ads are there

currently in dispute between the parties?

MS. HERRERA: There are about 50, Your Honor. But this is a -- sort of a separate issue. It's not a business record issue.

We're not asking plaintiff to stipulate to their relevance. The only issue from our perspective is that plaintiff asked us to provide a declaration establishing that the ads were actually run. They now are using the word "aired." We provided that declaration. Their sole issue is that they don't like that Ms. Stankevich said, "used to promote *Beauty and the Beast* to the public," which could only have one meaning if it was actually used to promote to the public.

THE COURT: Let me stop you. Let me stop you. This is really head-of-a-pin stuff, but that's where we're going to go because apparently that's where the fight is.

Did they use -- this is a yes-or-no question. Did they use a specific word that they wanted your declarant to use before they would agree to authenticity?

MS. HERRERA: So I did not understand that to be the substance of the objection, but the specific word they used on the exhibit list was "ran."

THE COURT: They said --

MS. HERRERA: It was not "aired."

THE COURT: Okay. They said we want a declaration from someone that said that they ran, the ads ran?

MS. HERRERA: That's correct. Although we didn't discuss that it needed to be that word.

THE COURT: Okay. No. I understand. But this is the fight we apparently are having.

MS. HERRERA: It is.

THE COURT: Does your declaration use in any conjugation the verb "run"?

MS. HERRERA: No, Your Honor, that's not an industry term, so our declarant used language that --

THE COURT: That's also a yes-or-no question. I'm not asking for argument about whether it was the right or not-right thing to use that word or do they have the right to insist on it or whatever. This is lawyers fighting about whether something can come into evidence or be authenticated. They made a request. It sounds to me like the request was not satisfied.

So the parties' prior course of dealing about whether there is an agreement is irrelevant. Now we just have this exhibit. And the question is, is it authentic; right? Because you yourself have said you don't understand there to be any stipulation to admissibility. The question is, is it authentic. And I'm gathering that -- and authentication, as you all know, is a fairly low bar. And this Ms. Stankevich who does high-level marketing decision-making for Disney says, "We made these ads, and we showed them to some focus groups";

correct? Or something like that.

MS. HERRERA: She actually said they were used to promote the movie to the public. She doesn't say, "We made them and they were shown to focus groups."

THE COURT: I see. Okay. But she says Disney made these.

MS. HERRERA: That's correct.

THE COURT: And then we used them as you just said. So then, Mr. Patterson, my question is, A, are we really fighting now about authenticity only? Is that what we're fighting about?

MR. PATTERSON: Yes, Your Honor. But authenticity with respect to whether they are what they purport to be, which is ads that were actually aired.

THE COURT: Well, you're going to have a -- okay. Ms. Herrera is a witness going to be on the stand and say here -- you know, we made these ads, and here's who we showed them to?

MS. HERRERA: So, Your Honor -- others should correct me if this is not -- others on my team should let me know if this is not correct. But I don't believe that is the intent. I believe that these exhibits were relied upon by our marketing expert, and she is going to testify about them so the purpose of the declaration was for someone with knowledge from Disney to authenticate them in advance of trial because plaintiffs

were maintaining authenticity objections.

THE COURT: And is it -- and can I infer from what you've just said that these videos will not be shown to the jury?

MS. HERRERA: I believe that is correct, but if -- Mr. Klaus can address that if that's not right.

THE COURT: Mr. Klaus, is that correct, they will not be shown to the jury?

MR. KLAUS: It is a commercial, Your Honor. We think that they -- we would reserve the right to show --

THE COURT: That is not my question. It is the Thursday before jury selection. I need to decide this. Are you going to show them to the jury? You can say yes --

MR. KLAUS: Yes.

THE COURT: -- and then not actually show them. That's fine.

MR. KLAUS: Yes.

THE COURT: Okay. Great. I'm sorry if I'm becoming more stern as time goes by.

Mr. Patterson -- well, first of all, who -- what witness is going to be testifying while those videos are being shown, Mr. Klaus?

MR. KLAUS: That would be Ms. Kershaw, who is our marketing expert, Your Honor.

THE COURT: And will she say to what use the videos

were put when they were originally made?

MR. KLAUS: Yes. Yes. That they were commercials that were shown to the public.

THE COURT: Interesting. This is getting harder, not easier.

Mr. Patterson, as you know, experts are permitted to rely on anything that an expert in their field would typically rely upon, even when it's hearsay or whatever. But now I think we have a different issue in front of us because the question of -- they can rely on it, but that doesn't mean necessarily that it gets presented to the jury.

This feels a little undeveloped. I feel like all of sudden, I'm going to want to start asking questions that are not addressed in this case management statement. Perhaps I should just let the parties finish making their arguments.

Mr. Patterson.

MR. PATTERSON: I don't have much else to say, Your Honor, other than I certainly agree with Your Honor, that an expert can rely on otherwise inadmissible material. The issue with authenticity is that when Ms. Kershaw takes the stand and says these 30 -- you know, these 50 ads were aired in the promotion of the movie, then that's a disconnect between what Ms. Stankevich said and what Ms. Kershaw is expected to say.

THE COURT: Ms. Herrera, on what syllable of her last name does Ms. Stankevich place the greatest emphasis?

MS. HERRERA: I believe it's the first one, Your Honor --

THE COURT: Stankevich.

MS. HERRERA: Or maybe it's the third. Stankevich. Yeah. That's correct.

THE COURT: Well, she is your expert. I'm going to go with your pronunciation.

What does she say in the declaration about when these videos -- when and to whom these videos were shown?

MS. HERRERA: So all Ms. Stankevich says in the declaration is that they were used to promote the movie to the public. We understood that to be what plaintiffs' authenticity question was. We think questions about when, how many times, in what markets, that is discovery. Plaintiffs could have taken discovery on those facts. Ms. Stankevich was disclosed as a witness. They did not depose her.

So we didn't think that an authenticity declaration needed to sort of develop all of those facts. We understood the issue to be whether they actually ran, which we thought was a fair question. And Ms. Stankevich went and personally checked that each one actually was used to the public. I represented that to Mr. Patterson in our meet and confer. And that is what the declaration says.

THE COURT: I think I've been saying Ms. Stankevich. The case management statement says that the person's name is

Ryan Stankevich.

MS. HERRERA: That's correct. She is a woman. She uses she/her pronouns.

THE COURT: Thank you. So there are other objections to these marketing reports, but there is just an authenticity objection to the TV ads; is that correct, Mr. Patterson?

MR. PATTERSON: No. There is a relevance objection as well.

THE COURT: All right. I'm going to take that under submission.

The parties have asked me not to address capital letter E today, which brings me to capital letter F, which is the scope of Alberto Menache's expert testimony.

MR. KLAUS: Yes, Your Honor. That's me.

THE COURT: All right. Go ahead.

MR. KLAUS: Yes, Your Honor.

The -- the issue here is that Mr. -- Rearden intends to have Mr. Menache offer the opinion that DD3 used blendshapes, and in the -- in the -- in the course of creating the -- the MOVA Rig, and that -- not the MOVA Rig, I'm sorry, the Beast Rig. And that this is, we believe, an attempt to bring into evidence evidence that was excluded through the Maya Scripts order, which is Docket 480. The entire point of the Maya Scripts order, as stated on page 1 and 2, was that we moved for an order precluding Rearden from introducing evidence

at trial related to the theory that DD3 infringed Rearden's copyright --

THE COURT: Mr. Klaus --

MR. KLAUS: Yes?

THE COURT: Is your argument that Mr. Menache wants to testify that these characters were created using blendshapes, and the only way to make blendshapes is through the use of Maya Scripts? And the Court already precluded evidence regarding the use of Maya Scripts? Is it more complicated than that?

MR. KLAUS: It -- that is, in essence, the argument, Your Honor, but I would like -- can I make one -- can I say one thing in addition to that?

THE COURT: Yes.

MR. KLAUS: Is that what Rearden now says is that Mr. Menache should be able to testify about blendshapes without mentioning the word "Maya Scripts." And the problem with that is Mr. Menache said in his surrebuttal report, he said in his deposition testimony, that Rearden has designated and submitted that the way that these blendshapes were created was with Maya Scripts files, meaning the use of MOVA, according to Rearden, after the point in time when the tracked mesh was created.

And at -- what the order said on page -- at Docket 480 at page 10 is that there was prejudice to us because fact discovery was closed, and we had had no opportunity to take discovery of whether scripts were used after the tracked mesh

was delivered to DD3's visual effects team.

THE COURT: Mr. Carlson, who will argue this for Rearden?

MR. CARLSON: Your Honor, I will respond.

This is -- is or should be a non-issue. It arises out of a great deal of confusion that defendants have created. I'd like to take a moment to clear up the confusion.

The first is what is blendshapes? When you capture an actor's performance and you intend to -- to do a continuous capture, that is, that the actor stands there and delivers all the lines from the scene that you want to do and then MOVA is used to stitch, frame by frame, all of those together so you have a moving mesh. And then that is used to animate the face. That is one way of animating a face.

Another way is to do what's called FACS, F-A-C-S, poses, and in that instance, the actor stands in the MOVA Rig and makes faces, essentially. They get a passive face, a big smile face, a little smile face, eyes, surprised face, scared face. They make a whole bunch of these, and it's just a single frame for each one.

And then all of those are put together in a library, and it becomes like a pallet that the -- that the animator can use. So the animator wants the Beast to smile. So he takes a passive face and then puts that in. And then several fames down, he puts the smiley face in. And then blendshapes is a

software function that blends the two together so that you can see the smile gradually emerging from the passive face.

That's what blendshapes is.

Now, the second source, I think, of confusion that defendants have created here is when they talk about Maya Scripts, and we've all -- we used that term before, but we were using it before specifically with reference to MOVA's Maya Scripts. That is, Rearden wrote scripts in Maya's proprietary language just for use with Rearden's MOVA output. Right? So it provided those -- and one of those scripts was a script that allowed the creation of blendshapes.

Maya comes from Adobe. And Maya has built-in scripts, and one of those built-in scripts also creates blendshapes. And what Mr. Menache is going to testify to is that DD3 created or captured FACS poses, a set of FACS poses and that he believed that when DD3 animates -- animated the Beast face, it did it using blendshapes. They used that technique.

I think a final source of confusion here is that the citations to Mr. Menache's deposition transcript don't say what the defendants say they say. And I'll take an example here.

THE COURT: Well, let me -- I want to hear that argument, but let me ask you a couple of questions to make sure I'm following your argument.

MR. CARLSON: Yes.

THE COURT: Is it possible to create a blendshape

without copying a Maya Script file?

MR. CARLSON: Yes. Yes. Blendshapes is a standard hand animation technique. It is the preferred technique in the industry because it's faster than having to make each of the changes of expression by hand. And it doesn't matter whether MOVA was used to originally capture the FACS pose or Medusa, Disney's proprietary facial animation or facial capture system, or any other facial capture system that's available.

You take the -- you take the tracked mesh for the facial pose --

THE COURT: Yes. On page -- I'm just going to stop referring to both sets of pages and just use the one that -- number that's at the bottom of the actual printed page. On page 49, Disney says that Mr. Menache opined that DD3 used MEL Scripts for its work on *Beauty and the Beast* and that what Disney says is that by that reference, Mr. Menache meant Maya Script files.

MR. CARLSON: No.

THE COURT: Is that correct, or do you disagree?

MR. CARLSON: It is not correct.

So MEL is the name of Maya's proprietary language, programming language for writing scripts. It is the language that Rearden used when it wrote MOVA Maya Scripts. It wrote it in the MEL programming language. It's also the same language that Adobe used when it programmed the same functionality --

THE COURT: Yeah. Let me interrupt you because I really am concerned about time at this point.

Mr. Klaus, I don't know -- I don't feel that in this hearing, I'm going to be able to resolve what sounds to me like a fairly technical dispute about whether or not the software in question used Maya Scripts and if so, to what extent. I mean, it just feels very much not like something that I should be dealing with on the fly.

MR. KLAUS: Your Honor, I would say the following, which is we'd be happy to take this up at another point when we're working before Mr. Menache gets on the stand. However, I do need to say that in response to what Mr. Carlson said about the -- that Mr. Menache is going to testify that the blendshapes were created using Adobe's off-the-shelf Maya Scripts, what Mr. Menache actually said in his surrebuttal report, which is the first time that the -- which is the first time that we had an explication of his theory that the blendshapes were used. And this is -- I'll give you a docket number. It's 411-3.

And what he says, "In the same group of post discovery files, I, Mr. Menache, found a few files used to generate FACS blendshapes. The image below shows a file that was open."

He then says it is very clear that the scripts, meaning the Maya Scripts, that he's just described, are loaded into RAM when any of these Maya files is opened. It can also be shown

MOVA was used to create blendshapes using the FACS expressions captured by MOVA Contour.

And he says on the following page when describing the scripts -- he says that the scripts that he found were used to create blendshapes. He says, "We have seen this has already been done."

And the last thing I would say, Your Honor, is that in the portion of Mr. Menache's deposition that Mr. Carlson designated at page 338: "Question: Where is the MOVA Contour software program used in the process of creating a blendshape?"

Mr. Menache's answer is, "It's used in the capture. It's used in the processing, then the tracked meshed mesh, and then the creation of actual blendshapes."

The only opinion that has ever been disclosed to us at any point in time -- and this was well after the close of fact discovery -- was that it was the Maya Script files that -- that Rearden alleged contained their source code, not Adobe -- not Adobe. And that's -- that's really -- that's our concern with this.

THE COURT: Does anyone object to my displaying a few pages from Mr. Menache's report at ECF411 on the screen?

MR. CARLSON: No objection, Your Honor.

THE COURT: It's under seal, so I need the parties' permission before I do that.

Mr. Klaus, do you have any objection?

MR. KLAUS: I believe this was all Rearden confidential information. They were the ones who wanted this --

THE COURT: Do you have an objection, Mr. Klaus?

MR. KLAUS: No.

THE COURT: Thank you.

Okay. There's page 5. I think that's the page Mr. Klaus was just reading from.

Okay. Now I'm on page 4. And you can see it says, "And opens another Maya window."

Mr. Carlson, is it your contention that that -- "another Maya window" refers to something other than the Maya Scripts, which were the subject of the Court's prior order?

MR. CARLSON: Your Honor, I don't have enough context, and I don't want to mischaracterize the report.

So here, he is -- it appears that he is talking about functionality built into Maya as opposed to a -- a Rearden-authored tool.

Maya contains a window called Hypergraph. That's a -- that's a built-in Maya function, and the image below shows it with the script notes. And then it says the user can select and open another Maya window.

So I guess that's how I would interpret this.

THE COURT: Well, these -- I gather the graphic representation from this page that's now on everyone's screen

that shows, quote, script nodes. Those are Maya Script nodes of the kind that I -- in the way that I used Maya Script in my prior order; correct?

MR. CARLSON: Well, Maya -- Maya Scripts are MEL Scripts, and Rearden wrote MEL Scripts and Adobe wrote MEL Scripts. Adobe has built-in MEL Scripts that perform blendshapes.

Your Honor, may I point out that at the time the report was submitted, we were focused on MEL Scripts because that was an infringement issue. And so we didn't -- we didn't discuss all the other ways that blendshapes can be created.

But the -- the -- the argument that FACS poses that were captured using MOVA and therefore infringed were used to hand animate the Beast is still viable in the case.

And, Your Honor, may I -- may I just read from -- briefly from the script that defendants cited in support of this proposition?

THE COURT: You may, but I have to tell you, our discussion of this topic is rapidly coming to a close. I'm being asked to process too much information in too short a period of time without adequate context. And I have the feeling, now that I've taken a look at this report, that if I can really get my arms around it, I'm going to wind up being deeply disappointed by at least one of the positions that was taken today. But I don't know as I sit here right now which

one that is.

Go ahead.

MR. CARLSON: Your Honor, this is at pages 44 to 45 of the Menache deposition, and it makes the distinction I just articulated clear. And this is cited by Disney.

Here is the question. "You said Maya is a computer software; correct?

"Yes.

"And it has a programming in it that is separate and distinct from the MOVA Contour software program; correct?

"Yes.

"And that those programs within Maya can do things that the MOVA Contour software program cannot do; is that right?

"Yes.

"And what kind of things can the Maya software program do that the MOVA Contour software program cannot do?"

The witness gives some examples.

"Question: Anything else that would have been used top animate the Beast that is a functionality in the Maya program that you can't do with MOVA Contour software?

"Answer: Yeah. Animating the face using blendshapes."

This is a direct quote from a portion of his deposition that Disney cites.

THE COURT: Sounds helpful.

I'd like the parties to just talk with each other and

figure out how you can brief this a little more thoroughly as a standalone motion. I want to discourage the parties from unnecessary length, but having said that, this is a complicated issue. And by, I don't know, 3:00 today, just file a stipulation telling me what the schedule is so that I can anticipate when these papers might come in.

Okay. Let's turn to capital letter G, which I think is the last issue the parties want to discuss today. And that is captioned as evidence of MOVA's ownership prior to August 2012 but appears to relate to or relate primarily to a meeting or meetings that Mr. Perlman had in 2008.

MR. KLAUS: That's Ms. Herrera for us, Your Honor.

THE COURT: I want to hear from the plaintiffs first.

Mr. Carlson, who will be arguing this for Rearden?

MR. CARLSON: It would be me, Your Honor.

THE COURT: Do you think Disney mischaracterizes the Court's prior rulings?

MR. CARLSON: I -- I did not go back and compare the Court's prior rulings to what they said about them. So I -- I wouldn't be comfortable jumping in and answering that.

THE COURT: Okay.

Further argument?

MR. CARLSON: Yes. From us, first of all, there's a disjunct between the heading and what they talked about in the body. It sounds like from the heading, they want to exclude

everything that happened before August 2012. And in the body, we're talking about two meetings that happened in October of 2008.

I think it's -- it's preposterous to try and exclude everything that happened before August 2012. That's, you know, six years of invention by a dozen people to develop this software that costs Rearden $12 million. And in a copyright case, we can't get that to the jury? So I think that's just -- that's just absurd.

So assuming that what defendants actually are concerned about are two meetings with Disney senior executives, including Bob Iger that occurred in October of 2008, I do think that this is relevant to Disney's ability to supervise or control. These are the meetings that gave Disney the email address for Mr. Perlman. It gave them his phone number, which they used in the course of doing this. And it provided notice to Disney that Rearden's OnLive company owned the MOVA copyright.

And they are free to attack on cross-examination the passage of time between 2008 and 2015, even though most or if not all -- well, I know not all, but most of the executives were still with the company.

But they're free to try and attack the weight that should go into this. But I think it's clearly relevant that Mr. Perlman met with senior executives, not once, but twice, including the chairman of -- of the Walt Disney Company and

told them about MOVA and discussed MOVA and what it could do for Walt Disney. And so we think that -- that should come in.

I guess it should come in on the right and ability to supervise or control.

THE COURT: Well, and actually you made the point a second ago that it's relevant on the issue of whether -- of notice to Disney that Rearden owned the MOVA copyright. And I think the parties dispute whether that is at issue in the trial. But I agree with you, if that is at issue in the trial, then it's potentially relevant. So, all right.

Mr. Klaus, who will argue this point for Disney?

MR. KLAUS: Ms. Herrera, Your Honor.

THE COURT: Oh, that's right. You said that.

Ms. Herrera.

MS. HERRERA: So just jumping off from Your Honor's last point, it is undisputed that Rearden owned MOVA prior to the August 17th, 2012 assignment for the benefit of creditors, and it is also undisputed that as of August 18th, 2012, Rearden did not own MOVA. That is part of the undisputed facts before the Court in the pretrial conference statement on page 2.

There is no dispute. Everyone --

THE COURT: Isn't that a different issue, though? That's a different issue. The issue is, is Disney's knowledge of Rearden's ownership relevant.

MS. HERRERA: I understand Your Honor's point. Let me

make my point a different way.

Disney is not denying and isn't going to contest that Rearden owned MOVA prior to August 12th, 2017 or that Disney was aware of it. That's not a live issue in the case. Everyone agrees that Disney had knowledge or awareness that MOVA was owned by Rearden prior to that date. And everyone agrees that after that date, MOVA was not owned by Rearden.

And so in Your Honor's summary judgment order on page 7, Your Honor talked about these exact meetings in 2008. It was in the context of the contributory infringement claim because that was the purpose for which this evidence was initially offered.

And Your Honor describes the evidence and then says on the bottom paragraph of that page, "All of the foregoing interactions involving Disney predate LaSalle's 2013 sale of the MOVA assets to SHST and are thus not probative of whether Disney knew in 2015 that DD3 was not authorized to use the MOVA technology."

And there Your Honor is quoting *Crystal Dynamics*. And so --

THE COURT: Right. And that's still true. So is this sort of a 403 argument, which is, hey, this issue is not really in dispute, and if Mr. Perlman gets to testify that he met with Bob Iger, then they -- you know, then Rearden gets all of this free kind of glamour and credibility when the fact is not

really disputed?

MS. HERRERA: I think it is a 403 issue but not exactly the way Your Honor put it. I think the issue is that Rearden has designated testimony from a witness solely for this purpose, and there's 14 exhibits that go solely to this issue. And so defendant will have to waste some of its limited trial time countering that witness' testimony on this issue to contextualize it to the jury, which we can certainly do. But I think our position that the prejudice is having to use our trial time to counter an issue that isn't in dispute. That's the main 403 issue from our perspective. And that's -- Kevin Mayer is the witness whose testimony is solely being offered on this issue. And the exhibits at issue are listed in the pretrial conference statement.

THE COURT: Mr. Carlson.

MR. CARLSON: Yes, Your Honor. It is true that the liability claim that Rearden is asserting does not have a knowledge element in it. And so we are no longer required to prove knowledge in order to prevail in our liability claim. But I think it is also true that Disney is -- their defense has been to, in our view, to try and backdoor a knowledge element back into the -- to the case. And it has to do with their practical ability to supervise and control.

And what they want to say is that we weren't in the room when the infringement happened, and we didn't know infringement

was going on. And there was this big lawsuit that was intensely factual, and no one could know who owned MOVA. They want to put all that evidence in. And -- and we don't get to respond that, well, you sat down with Bob Iger and 10 other senior executives just a few years before and told them -- you had a private meeting with them and told them that you owned MOVA.

THE COURT: I get the point. That's a good point, you know, a question of motive.

You know, I think without ruling or suggesting a ruling, jury instruction 17.20 does, I think, bring into play how motivated should someone be to do the investigating and controlling that 17.20 talks about. I think that's sort of your point, Mr. Carlson.

MR. CARLSON: Yes.

THE COURT: Which is if somebody has a Mouse Meet technology that's subject to intellectual property protection, the incentives to do the work that 17.20 talks about are much reduced.

Ms. Herrera, you can go last, if you like.

MS. HERRERA: Thank you, Your Honor. Just briefly, the issue is that after those meetings, it is undisputed that Rearden no longer owned MOVA, and everyone knew it. Mr. Lauder also contacted Disney when he owned MOVA.

And so I completely take Mr. Carlson's point and Your

Honor's point. And I think at later periods when Disney's knowledge, you know, is relevant or could potentially be relevant to ability to control or -- you know, you put it as motive to investigate, the issue is that the 2008 meetings don't go to any of that, are not probative to any of that because everyone knew that as of August 12th, 2017, MOVA was not owned by Rearden anymore.

We can tell that story, and we will tell that story if Your Honor lets this evidence in. It's just an issue of time usage, to explain that everyone agrees that Rearden no longer owned MOVA as of that date and therefore it's not probative of what Disney knew in 2015 when it retained DD3.

THE COURT: Mr. Carlson, is there any dispute that everybody knew that Rearden didn't own MOVA as of August 12th, 2017?

MR. CARLSON: I don't know that there -- that I would necessarily agree. I don't know who everybody is. And I don't think Disney --

THE COURT: Think -- think carefully. We're going to try this again.

Are you aware of evidence tending to show that Rearden owned MOVA on August 13th, 2017?

MR. CARLSON: Rearden did not own MOVA when it was assigned to -- from OnLive to OL2 until it was assigned back to Rearden from MO2. It -- it owned it after OL2 assigned to MO2.

THE COURT: What was the injunction date again? I'm sure you all have that memorized.

MR. CARLSON: June 17 --

MS. HERRERA: 2016.

MR. CARLSON: 2016.

MS. HERRERA: The relevant date, Your Honor -- I don't know if this was just a slip of the tongue, but it's August 17th, 2012. I think Your Honor said August 2017.

THE COURT: I see. Okay. Thank you. I'm sure I transposed the numbers in my notes, and I was reading from my notes.

Okay. Well, I think I have everyone's arguments. Thank you for those.

MR. PERLMAN: I apologize, Your Honor. I've been unable to reach my counsel. May I have one minute to do that?

THE COURT: Yes.

MR. PERLMAN: Thank you.

THE COURT: Mr. Perlman, how are you going to reach them?

MR. PERLMAN: I tried texting them, and they've been very busy and I'm sure engaged with you. I could call them.

THE COURT: What's going to happen -- Mr. Perlman, I would say -- I just want to say for the record, we were together for an hour. And then we took a break, and then between 10:30 and 12:05 p.m., we have been conducting this

hearing. And you -- you -- the Court will grant you a minute, and we'll see what happens, but this isn't going to take very long. Go ahead.

MR. PERLMAN: Understood. This was a technical matter --

THE COURT: Mr. Perlman, if I were you, I would stop talking to me, and I'd get on the phone with your lawyers.

MR. PERLMAN: Understood. Thank you very much, Your Honor.

(Pause in proceedings.)

THE COURT: All right. Let's go back on the record. Mr. Carlson.

MR. CARLSON: I apologize to the Court and to counsel. In a conference with Mr. Perlman, he corrected me on a technical issue, and I -- I feel that it's just not appropriate to bring up at this point in time.

THE COURT: I see. If there's something that you want to -- if there's any statement that you or Mr. Patterson made earlier that you would like to correct, you should feel free to do so. That's fine.

MR. CARLSON: Yeah. If either of us had said anything incorrect to the Court, we would have -- I would tell you now, but --

THE COURT: I see. Okay.

MR. CARLSON: It's a tangential thing to what we were

talking about.

THE COURT: Very good. All right. Thank you all. I look forward to seeing you all on Tuesday morning. I'm sure we will have further communication before then. Thank you.

(Proceedings adjourned at 12:08 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, November 30, 2023

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter